IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1090 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SUNIL CHANDRAKANT SHAH

Versus

COMMISSIONER OF POLICE

Appearance:

MR JITENDRA MALKAN for Petitioner

Mr. Kamal Mehta, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 01/05/98

ORAL JUDGEMENT

The petitioner is arrested and kept under detention pursuant to the order of detention dated 8th November 1997 passed by the Police Commissioner for the city of Baroda invoking his powers under Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act, (for short "the Act"). By this application under Article 226 of the Constitution of India, the petitioner challenges the legality and validity of that detention order.

2. The Police Commissioner came to know that the petitioner was the head-strong person and by his several subversive and nefarious activities he was terrorising the people. After studying the papers and complaints lodged against the present petitioner it was found that the petitioner was a fiend and was often by his nefarious activities giving rise to bedlams and thereby he was disturbing the public order. He was committing theft, robbery and several other offences. He was possessing different weapons without any pass or permit and using those weapons he was committing several wrongs and causing damage to the properties or injuries to the persons. He asked the people to satisfy his unjust demands, whims and commands. Those who failed or refused to bend his way were brutally dealt with. It was also found that about 9 complaints of the offences of theft punishable under Section 379 read with 114 of the Indian Penal Code were filed with Sayajiganj and Karelibaug police station. As alleged, the petitioner was committing the theft of motor-cycles and parts thereof, camera, cash and valuable articles and two wheelers of different types. He used to extort money and even snatched away the purses from the pocket of the persons. The people were feeling insecured because many times, the petitioner used to put them in the fear of instant death or hurt. No one was coming forward to lodge the complaint because of the fear of violence and every one used to put up with petitioner's atrocities. The Police Commissioner thought it fit to check the subversive and nefarious activities of the petitioner disturbing the public order. He through the members of the staff tried to record the statements of the witnesses but no one was willing to come forward and give statement because of the fear of violence endangering his safety. After considerable persuasion and when assurance was given that their particulars disclosing their identity would be kept secret, some of the witnesses showed their willingness to give statements. Perusing the statements the Police Commissioner was satisfied that the petitioner was committing several wrongs in succession and was striking terror in the society. Because of his dread and terror every one used to suffer injustice rather than challenging his activities going berserk. The strict action to curb his such anti-social activities was necessary but after cogitation the Police Commissioner found that any action under the general law sounding dull if taken would yield no result. The only way out was to pass the order of detention and detain the petitioner. In the result, the impugned order came to be passed and at present the petitioner is kept under detention.

3. The order in question is challenged on several grounds, but at the time of submissions, both the learned advocates tapered off their submissions confining to the only point, namely exercise of privilege under Section 9(2) of the Act. According to the petitioner, no doubt, under that Section it is open to the detaining authority to exercise the privilege and decide whether certain facts should be disclosed or not, but the privilege has to be exercised judiciously and not arbitrarily or capriciously. If without any good cause the particulars are suppressed, it would certainly impair the right of the petitioner to make effective representation. In this case, no good cause is shown. The petitioner was entitled to have the particulars about the witnesses not given. Had the particulars been given, the petitioner would have represented and pointed out whether the statements recorded were reliable. When his right was jeopardised, his continued detention on that count may be held illegal.

4. In reply to such contention, Mr. Kamal Mehta, the learned APP submitted that looking to the retaliatory nature of the petitioner and to protect the safety of the witnesses when in the public interest considering all relevant circumstances and materials on record, the privilege is exercised for not disclosing the particulars, the right of the petitioner cannot be said to have been jeopardised. The order being quite in consonance with law is required to be maintained.

5. Before I proceed, it would be better if the law law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest.

The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the detention order has to satisfy the court that it was

absolutely necessary in the public interest to protect the witnesses keeping their safety in mind and the factors emerging on record. The affidavit of the detaining authority is not filed. Hence it can be assumed that without any just cause the privilege is exercised and certain particulars are suppressed. Reading the order, itself it appears that the task about the inquiry qua fear expressed by the witnesses was entrusted to the other officer and whatever the other officer reported has been mechanically accepted only on the ground that there was no reason to doubt the report made and also under the assumption that every thing was done in order, and honestly report was made and there was, for the detaining authority, no reason to differ with the opinion expressed. In fact, there is no personal application of mind for being satisfied about the exercise of the privilege. The subjective satisfaction is therefore vitiated. In short, the case about non-disclosure exercising the privilege under Section 9(2) of the Act is not made out, and therefore the continued detention is illegal. The petitioner for want of the particulars suppressed could not make effective representation, as a result, his right was jeopardised. The continued detention must therefore be held to be illegal and unconstitutional.

7. For the aforesaid reasons, the petition is allowed. The order of detention dated 8th November 1997 is hereby quashed and set aside. The petitioner is ordered to be set at liberty forthwith if not required in any other case. Rule accordingly made absolute.

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(rmr).